Extrajudicial Disclosures of Confidential Communications—A Continuing Dilemma for the Lawyer

A recent Alabama decision raises the possibility that professionals who have a confidential or fiduciary relationship with their clients may be subject to a cause of action initiated by their clients for a breach of that trust or confidence.1 In Horne v. Patton plaintiff alleged that, contrary to expressed instructions,2 defendant physician divulged information to plaintiff’s employer3 that was acquired in the course of a doctor-patient relationship4 which resulted in his dismissal from employment.5 Plaintiff brought an action seeking damages, asserting that the alleged conduct constituted a breach of fiduciary duty, invasion of privacy, and breach of an implied contract.6 The trial court sustained defendant’s demurrer to all three counts and plaintiff took a voluntary nonsuit.7 The Supreme Court of Alabama reversed and remanded, reasoning that a physician is under a general duty not to make extrajudicial disclosures8 of information acquired in the course of a doctor-patient relationship and that such a breach will give rise to a cause of action.9

2. Plaintiff’s amended complaint alleged that “plaintiff instructed defendant doctor not to release any medical information regarding plaintiff to plaintiff’s employer . . . .” Id. at 704, 287 So. 2d at 825.
3. Count one of plaintiff’s amended complaint alleged that “defendant doctor proceeded to release full medical information to plaintiff’s employer without plaintiff’s authorization . . . .” Id. at 704, 287 So. 2d at 825.
4. Count three of plaintiff’s amended complaint alleged “plaintiff entered into a physician-patient contractual relationship for a consideration with the defendant . . . .” Id. at 705, 287 So. 2d at 826.
5. Id. at 704-5, 287 So. 2d at 825-26.
6. See id.
7. An Alabama statute allows the taking of a voluntary nonsuit by a plaintiff when he suffers a particular adverse ruling as defined under the statute. Ala. Code tit. 7, § 819 (1958).
8. The court emphasized that this case only relates to extrajudicial disclosures. 291 Ala. 708-9, 287 So. 2d 829-30.
The *Horne* decision has great significance to the legal profession because of its intense disapproval of disclosures of confidential communications.\(^{10}\) Attorneys have been disciplined for using or disclosing knowledge gained through former lawyer-client relationships.\(^{11}\) For example, in *In re Boone*, the court recognized that an attorney is not allowed to divulge information and secrets imparted to him by his client.\(^{12}\) The court also held that a contract signed by the client which waives the privilege of confidence and secrecy is void.\(^{13}\)

A few cases have even allowed clients to maintain civil actions against attorneys for unauthorized disclosure of confidential communications. In the early decision of *Taylor v. Blacklow*, the client maintained a civil action against his attorney for damages caused by an unauthorized publication of his affairs.\(^{14}\) In the *Taylor* decision the attorney discovered a possible defect in the title to land in abstracts entrusted to him by his client. The lawyer contacted the adverse claimant and represented him in a suit against the former client. The client successfully defended his title but was unable to collect legal expenses from the claimant. The court allowed the client to recover from his former attorney.\(^{15}\) In the more recent case of *Lakoff v. Lionel Corp.*, plaintiff, an inventor, hired a patent attorney who failed to inform plaintiff that he was also the patent attorney of defendant corporation which had interests adverse to plaintiff.\(^{16}\) Plaintiff brought an action for damages against the attorney for unauthorized disclosure to the corporate defendant of informa-

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10. A confidential communication exists when the communication originates in a confidential nature and when disclosure of the information would cause greater injury to the relation than benefit to be gained by disclosure of the information. See 8 J. Wigmore, *Evidence* § 2285 (McNaughton Rev. 1961) [hereinafter cited as Wigmore].

11. *In re Boone*, 83 F. 944 (C.C.N.D. Cal. 1897).

12. *Id.* at 953.

13. "A client may waive a privilege which the relation of attorney and client confers upon him, but he cannot enter into an agreement whereby he consents that the attorney may be released from all the duties, burdens, obligations, and privileges pertaining to the relation of attorney and client." *Id.* at 957.


15. The court stated, in part, that the attorney "wrongfully and unjustly . . . in violation of his duty as an attorney . . . voluntarily and unnecessarily divulged the defect in the title of the Plaintiff . . . . There has been therefore a breach of duty on the part of the Defendant, attended with temporal injury on the part of the plaintiff, and there is no ground for saying that an action does not lie for such an injury, incurred by a breach of duty." *Id.* at 247-48.

tion relating to plaintiff’s invention. The court held that a disclosure in breach of confidence is actionable even if no damages are suffered by the client due to the unauthorized disclosure. However, the far more common practice against faithless attorneys is disciplinary action by the organized bar or court.

In *Horne*, emphasis was placed on the wording of Alabama’s state licensing statute for the healing arts and the accepted precepts of the medical profession which recognize the confidential nature of the doctor-patient relationship. The *Alabama Code* contains a similar statute for attorneys which recognizes the privilege that exists between attorneys and clients in regard to confidential communications. Canon 4 of the *Code of Professional Responsibility* of both Alabama and the American Bar Associations states that both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed him. The Supreme Court of Alabama in *Horne*, citing the case of *Hague v. Williams*, recognized the need for patients seeking medical attention to be able to freely divulge information about themselves and the utter lack of a policy to be served by according the physician the right to gossip about a patient’s health. The *Code of Professional Responsibility* also recognizes the same policies, and it is important to note that, while the ABA

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17. *Id.*

18. The court noted that the gravamen of the action is the grave fiduciary relationship between attorney and client. *Id.*, 137 N.Y.S.2d at 809.

19. The court recognized a disclosure in breach of confidence is actionable and that it is immaterial whether or not the invention was patentable. *Id.*, 137 N.Y.S.2d at 809.


23. See 291 Ala. 708, 287 So. 2d 829.


25. ABA, *CODE OF PROFESSIONAL RESPONSIBILITY* [hereinafter cited as ABA Code], Canon 4 (which was adopted unanimously on August 12, 1969, by the House of Delegates of the American Bar Association, to become effective on January 1, 1970).


27. 291 Ala. 701, 706, 287 So. 2d 824, 826.

28. ABA CODE, supra note 25, Ethical Consideration 4-2 [hereinafter cited as EC] (which states in part, that, “Both social amenities and professional duty
Code does not have the force and effect of a statute, it is recognized by bench and bar as setting forth proper standards of professional conduct, and the Alabama Code of Professional Responsibility was promulgated by the Alabama Supreme Court.

The purpose of the attorney-client confidential communication privilege is to encourage the client to disclose all the facts and impressions concerning the case in order that the attorney may effectively handle the case. Many states have statutes controlling disclosure and Canon 4 of the Code of Professional Responsibility recognizes that a lawyer should preserve the confidences and secrets of a client. Canon 4 emphasizes the necessity for requiring that all confidential communications and disclosures made by a client to his legal advisor for the purpose of obtaining his professional aid or advice be strictly privileged.

Canon 4 also distinguishes between "confidences" and "secrets" in Disciplinary Rule 4-101(A). Confidences refer to that "information protected by the attorney-client privilege under applicable law." According to Isaacson, "the attorney-client privi-

should cause a lawyer to shun indiscreet conversations concerning his clients.")


30. See Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1384 (3d Cir.), cert. denied, 411 U.S. 986 (1972); ABA Code, supra note 25, EC 4-1 (which states, in part, that, "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system.").


32. "The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession." ABA Code, Preamble and Preliminary Statement, at 1.

33. 2 Mecham on Agency § 2297 (2d ed. 1914). See ABA Committee on Professional Ethics, Opinions [hereinafter cited as ABA Opinions], No. 250 (1943).

34. The Disciplinary Rules, which are mandatory in character, state the minimum level of conduct which no lawyer can fall without being subject to disciplinary action. ABA Code, Preamble and Preliminary Statement, at 1.

35. ABA Code, supra note 25, Disciplinary Rule 4-101(A) [hereinafter cited as DR].

36. Wigmore, advocates the following: "(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the commu-
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...was recognized at common law and has long been a component of the American legal system. This area of the law involves disclosures which relate to testimonial or evidentiary privileges at judicial proceedings that prevent compulsion of a disclosure by a court of law.

However, the court in Horne was concerned with the extrajudicial disclosure of a "secret." The term secret refers to "other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." The "secret" confidential communication has a broader scope than the evidentiary privilege. Isaacson comments, "It is not essential that the client's communication be relevant to the legal advice sought for the disclosure to be unethical." The effect of this ethical duty is to forbid voluntary disclosure by the attorney. However, the courts tend to treat all questions involving privileged communications as a single doctrine based on the attorney-client privilege, making no distinction between the evidentiary rule and ethical duty.


39. Lawyer-Client Privilege, supra note 20, at 235-36. For a discussion of the established tenants and relevant cases regarding testimonial privileges at judicial proceedings based on the attorney-client privilege, see McCormick, supra note 37, §§ 89-96.


41. See DR 4-101 (A).

42. Confidential Communications, supra note 38, at 678.

43. Thus, when an attorney learned from a client seeking a divorce that her husband had deserted her but had not told the draft board for fear of being drafted, the attorney could not divulge that information to the board or the court. ABA Opinions, supra note 33, No. 274 (1946). See Lawyer-Client Privilege, supra note 20, at 251-52.

44. Lawyer-Client Privilege, supra note 20, at 235-36.

45. The rationale is that confidential communications by or on behalf of a client may not be disclosed without his consent has long been a rule of common
The Alabama Supreme Court in *Horne* could have limited its decision to recognizing that a duty not to make extrajudicial disclosures exists and that a breach of this duty will give rise to a cause of action. Instead, the court created a dilemma by recognizing that this duty is "subject to exceptions prompted by the supervening interests of society, as well as the private interests of the patient himself." A lawyer, as a general rule, should not divulge confidential communications, information, and secrets imparted to him by the client or acquired during their professional relations, unless *authorized* to do so by his client. However, there are certain exceptions, such as when a disclosure of confidential information to proper authorities is necessary to prevent a contemplated crime or fraud. Opinion 314 of the ABA Committee on Professional Ethics recognized that even though the lawyer owes entire devotion to the law and is even governed by statutes in many jurisdictions. Therefore, it is usually a question of law rather than ethics. H. Drinker, *LEGAL ETHICS* [hereinafter cited as Drinker], 139 (1953). *See Lawyer-Client Privilege, supra* note 20, at 250-51; *ABA OPINIONS*, supra note 33, No. 247 (1942).

46. 291 Ala. 701, 708-09, 287 So. 2d 824, 829-30.
47. *Id.* at 709, 287 So. 2d at 830.
48. The privilege may be waived. *See* People v. Gerold, 265 Ill. 448, 107 N.E. 165, 178 (1914) (client waived privilege by voluntarily testifying to confidential communications between himself and his attorney); *ABA OPINIONS*, supra note 33, No. 91 (1933) (after client's death his personal representative or his heirs may waive the privilege).

49. *ABA OPINIONS*, supra note 33, No. 155 (1936). The court held the attorney was required to disclose the whereabouts of a client jumping bail, and commented, "When the communication by the client to his attorney is in respect to the future commission of an unlawful act or to a continuing wrong, the communication is not privileged." *See* *ABA OPINIONS*, supra note 33, No. 202 (1940) which held that the privilege does not forbid a corporate counsel from disclosing the wrongful acts of the corporation's executive officers to its board of directors; *ABA OPINIONS*, supra note 33, No. 156 (1936) which said that when an attorney applies for probation or suspension of a sentence and he implies that this client will abide by the terms and conditions of the court's order and when the client violates that order, the lawyer should then direct these facts to the proper authorities, even though the client himself was the source of the lawyer's knowledge. *But see* *ABA OPINIONS*, supra note 33, No. 23 (1930) (An attorney for a fugitive from justice should not disclose the fugitive's hiding place to the prosecuting authorities when he learns of it from information given to him by relatives.).

50. Clark v. United States, 289 U.S. 1, 15 (1933) (which states in part: "The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must the truth be told."). *See* *ABA OPINIONS*, supra note 33, Nos. 202 (1940), 314 (1965).
interest of his client, "the office of attorney does not permit, much less demand for any client, violation of law or any manner of fraud or chicane." 51 Nevertheless, seemingly conflicting opinions have been issued. For example, ABA Opinion 155 held that a lawyer must disclose the whereabouts of a client jumping bail since the communication by the client to his attorney is not privileged when made in respect to the future commission of an unlawful act or to a continuing wrong. 52 But ABA Opinion 23 states that an attorney for a fugitive from justice should not disclose the fugitive's hiding place to the prosecuting authorities when he learns of it from information given to him by relatives of the fugitive. 53 It has also been held that a lawyer is not required to report to the court or the draft board that the husband in a divorce proceeding is a draft dodger. 54 In all of these situations there is a violation of the law, but different decisions are reached regarding the disclosure.

Disclosure has been authorized in a variety of fact situations. A lawyer employed by an administrative body may make out-of-court disclosures to the public revealing gross abuses by the agency, after prior disclosure to appropriate public officials who refused to act, in order to invoke public opinion to halt these violations of the law. 55 An attorney practicing before an administrative body is under a duty not to mislead the agency, either by misstatement, silence, or through his client, but is under no duty to disclose the weaknesses of his client's case. 56 It has also been held that the privilege does not forbid a corporate counsel from disclosing the wrongful acts of the corporation's executive officers to its board of directors. 57

51. This opinion discussed the ethical obligation of the attorney while dealing with an agency such as the Internal Revenue Service and held the attorney must operate within the bounds of the law. ABA OPINIONS, supra note 33, No. 314 (1965).
52. See ABA OPINIONS, supra note 33, No. 155 (1936).
53. See ABA OPINIONS, supra note 33, No. 23 (1930). It should be noted that no actual conflict necessarily exists between Opinion 23 and Opinion 155 since Opinion 23 did not concern a continuing wrong but the disclosure of a past hiding place of a client who had returned from flight and had surrendered. R. Wise, Legal Ethics, 166 (1966).
54. See ABA OPINIONS, supra note 33, No. 274 (1946).
56. See ABA OPINIONS, supra note 33, No. 314 (1965).
57. See ABA OPINIONS, supra note 33, No. 202 (1940).

However, a lawyer need not inform the tax collector of the failure of a client to disclose income. See Drinker, supra note 45, at 138. Nor must he disclose that the client has paid money for a promise to secure preferential treatment after
Disclosure is also authorized in situations involving conflict between the attorney and client. When the attorney's client aids a prosecution against the attorney for conduct in connection with the matter in which the confidences are given, the protection of the privilege is waived and the attorney may reveal such confidences that are material to the proceeding. The lawyer may not use the confidential statements of his client concerning the client's financial resources to enable him to collect his fee, but he may use knowledge of financial resources where such knowledge does not appear to have originated in a confidential communication from the client. Nonconfidential information obtained from a client may be used in suing another client. The privilege can also terminate when the client attacks his attorney's good faith.

Bar association opinions add to the ambivalence of lawyers involved in litigation where a client either misleads a court or actually lies in the proceeding. For example, where the court is about to impose a sentence based on the misinformation that the defendant has no criminal record but the attorney learned of the record independently of his client's communications and has reason to believe that the court is relying on his silence as corroboration, he should inform the court not to so rely. However, it is also stated

induction into the military services of the United States. N.Y. County, supra note 55, No. 169 (1919). But an attorney employed during peace time by a foreign government should inform the authorities, after war breaks out between the United States and that government, of the existence of confidential communications and abide by their decision as to whether disclosure is necessary. N.Y. County, supra note 55, Nos. 167, 168 (1919).

58. However, it is important that the line should be strictly drawn in determining the materiality and relevancy of what the lawyer may properly disclose in order to ensure that such disclosure will not be used by the client indigentment or criminal proceedings against the lawyer. ABA Opinions, supra note 33, No. 19 (1930).

59. N.Y. County, supra note 55, No. 19 (1930). See ABA Opinions, supra note 33, No. 250 (1943).

60. N.Y. County, supra note 55, No. 196 (1921).

61. See Drinker, supra note 45, at 138.

62. When a client states that his lawyer has deceived him and thereby induced him to enter into a contract to the detriment of the client, the client has waived the privilege to otherwise confidential communications. N.Y. County, supra note 55, No. 218 (1923). Also, if the attorney has many clients in the same trade and is suing one such client for slander, the attorney, in order to protect his good name, may advise other clients of the same trade of the facts respecting the suit. N.Y. County, supra note 55, No. 319 (1933).

63. See ABA Opinions, supra note 33, No. 287 (1953). See also ABA Committee
that if a client tells the lawyer that perjury has been committed, such information would be privileged. Bar associations state that the lawyer should admonish the client to tell the truth and, if he refuses to do so, the attorney should not continue to represent the client.

Since it is possible, due to cases such as Horne, that a client may have a cause of action for unwarranted out-of-court disclosures, the lawyer is placed in a very precarious position. Of course, as Drinker indicates, the lawyer should always, if possible, notify his client and give the client a "reasonable opportunity to disclose the information or to show that the lawyer's information is incorrect or irrelevant."

In a recent work emphasizing the primacy of the lawyer's obligation to remain silent, it is argued by Dean Monroe F. Freedman that all of the alternatives to complete silence are bound to harm the lawyer-client relationship. The lawyer can serve effectively "only if he knows all that his client knows" about the case, and the client is not ordinarily competent to "evaluate the relevance or significance of particular facts." Therefore, the client cannot be expected to reveal information unless assurance can be made that it will be held in the strictest confidence.

Such an opinion may not be held by all in the legal profession, but it probably follows the conclusion of most lawyers.

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64. See id.; ABA COMMITTEE ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, Nos. 609 (1962), 869 (1965).
65. See ABA OPINIONS, supra note 33, No. 287 (1953).
66. Drinker, supra note 45, at 139.
69. Id.
70. Id.
71. Dean Freedman found that 90% of lawyers polled in a District of Columbia survey stated that they would question a defendant in "the normal fashion" even though the client indicated an intention to commit perjury. M. H. Freedman, supra note 67, at 38.